93-590

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PHYLLIS SCHMIDT and EARL SCHMIDT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Eighth Circuit Court of Appeals err in affirming the District Court's dismissal of plaintiffs' complaint as untimely when that decision is in conflict with decisions of other circuits and also in conflict with the recent decisions by the U.S. Supreme Court in *Irwin v. Veterans Administration* and the Eighth Circuit in *Schmidt v. United States (II)* which decisions would make the complaint timely filed pursuant to the Federal Rules of Civil Procedure?

2. Does a claim denial letter mailed by a federal agency comply with 28 U.S.C. §2401(b) when the federal agency fails to obtain a United States post office sender's receipt?

3. Should equitable relief be granted to plaintiffs where the government's administrative denial letter under 28 U.S.C. §2401(b) misinforms plaintiffs as to the commencement of the statutory filing period for their complaint?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Phyllis Schmidt and Earl Schmidt and the respondent was the United States of America.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners Phyllis Schmidt and Earl Schmidt respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on June 3, 1993.

OPINIONS BELOW

The judgment of the United States District Court for the district of Nebraska dismissing plaintiffs' action entered on July 9, 1992 is reprinted in the Appendix hereby.(A: A p. A-1-4 infra).

The opinion of the Court of Appeals for the Eighth Circuit issued June 3, 1993 is an unpublished opinion and is reprinted in the Appendix hereto, (A: B p. A-5-6, infra).

The order of the Court of Appeals for the Eighth Circuit denying Petition for Rehearing w/Suggestion for Rehearing En

Banc issued July 19, 1993 has not been reported as of this date and is reprinted in the Appendix hereby, (A: C p. A-7, infra).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1346(b), 2671-2680 (1982) (FTCA), the petitioners brought this suit in the United States District Court for the District of Nebraska. On July 10, 1992 the District Court entered an order and judgment dismissing the petitioners Complaint because the action was not filed within the time required by law.

STATUTES INVOLVED

28 U.S.C. Section 2401(b)
Time for commencing action against United States.

> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. Section 2675(a)
Disposition by federal agency as prerequisite; evidence.

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of

Civil Procedure by third party complaint, cross-claim, or counterclaim.

Fed. R. Civ. P. 5(b)
Service: How Made.

(b) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Fed. R. Civ. P. 6(a)

(a) **Computation**. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the date of the act, event, or default from which the designated period of times begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermedi-

ate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

Fed. R. Civ. P. 6(e)

(e) **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

STATEMENT OF THE CASE

On December 20, 1983, Federal air traffic controllers cleared an Ozark Airline flight to land in Sioux Falls, South Dakota. Phyllis Schmidt, a flight attendant on the plane, was injured when the plane struck a snow removal vehicle while landing on the runway.

The Schmidts filed a timely administrative claim for damages with the Federal Aviation Administration (FAA) on November 6, 1985, alleging that the air traffic controllers were negligent in failing to instruct the driver of the snow blower to leave the runway before they cleared the plane to land. (A: A p. A-1, infra) (Plaintiffs' Exhibit 51)

The FAA prepared a final denial of the Schmidts' claim in a letter dated November 19, 1986. The denial letter was received by Plaintiffs' attorney on November 24, 1986. The Schmidts' filed their FTCA complaint in the district court on May 21, 1987. (A: A p. A-1, infra) (Defendants Exhibit 1; Plaintiffs' Exhibit 52)

The United States moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that the FAA had mailed its final denial letter on November 20, 1986[1], and thus the Schmidts failed to commence their action within six months of the mailing of the FAA's final denial as required by 28 U.S.C. §2401(b).[2] Both parties filed written evidence on the jurisdictional question.

Since the motion of the United States to dismiss was accompanied by extrinsic evidence, the district court judge ordered the motion of the United States be treated as one for summary judgment giving the defendant the burden of proving when it mailed the letter. The parties were each given the opportunity to present additional pertinent evidentiary material relevant to the motion and the case was assigned to a magistrate for findings and recommendations.

After the parties each submitted additional evidentiary material, relevant to the motion, the magistrate found that a material issue of fact, the date of the mailing of the denial letter by the FAA to Plaintiffs' counsel, remained in dispute because the November 20, 1986 mail pickup might have been missed and it was possible that the denial letter was mailed on November 21, 1986. Thus the magistrate recommended that the motion for summary judgment be denied.

On December 29, 1988 the district court, after conducting a de novo review of the findings and recommendations of the magistrate, entered its Order and Memorandum granting the motion of

[1] The government had initially alleged in its' Motion to Dismiss that the letter was mailed on November 19, 1986. (A: I p. 23, infra)

[2] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. §2401(b) (1982).

the United States to dismiss plaintiffs' complaint. Judge Cambridge specifically found that although the date the FAA mailed the final denial letter of the Schmidts' claim was unclear, the burden was upon the plaintiffs to establish the jurisdictional facts where a defendant challenges jurisdiction. (A: G p. A-13-16).

Plaintiffs appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals for the Eighth Circuit affirmed the decision of the district court on April 25, 1990. The Court of Appeals found that the Postal Service mostly likely received the denial letter on November 20, 1986 but, in any case, the plaintiffs failed to carry their burden of establishing the facts to support subject matter jurisdiction. The court also found that the mailing procedure employed by the agent of the FAA, the DDD Corporation, satisfied the statutory certified mailing requirement of 28 U.S.C. §2401(b). (A: H p. A-17-21, infra).

Plaintiffs filed a petition for a writ of certiorari with the Supreme Court of the United States. On February 19, 1991, the Supreme Court granted the petition for a writ of certiorari, vacated the judgment of the Court of Appeals and remanded the case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S. Ct. 453, 12 L. Ed. 2d 435 (1990). (A: E p. A-11, infra).

On May 15, 1991, the Court of Appeals entered a new order holding that 28 U.S.C. §2401(b) "*is not jurisdictional*" but rather is "*merely an affirmative defense*" and thus reversed the judgment of the district court dismissing the Schmidts' complaint for lack of subject matter jurisdiction and remanded this case for trial on the merits of the Schmidts' Federal Tort Claims Act claim. (A: D p. A-8-10, infra). The defendant then raised the limitations defense as an affirmative defense and moved the district court for a bifurcated trial to settle this issue.

The district court thereafter granted the defendant's motion to bifurcate issues for trial on January 28, 1992, ordering that the

trial of this case shall first consider the question of notice of denial, leaving all other issues for later resolution, if necessary.

On July 9, 1992, the district court upon a trial of the issue of mailing of the notice of denial dismissed this action ruling plaintiffs failed to file their complaint within six months after the date of the mailing by certified or registered mail of the notice of final denial of their claim by the FAA and also determined that the doctrine of equitable tolling did not apply. (A: A p. A-1-4). The District Court made no finding on estoppel.

Plaintiffs appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals for the Eighth Circuit affirmed the decision of the district court on June 3, 1993. (A: B p. 5-6, infra).

Plaintiffs filed a petition for rehearing by court en banc and/or rehearing which was denied by the Court on July 19, 1993. (A: C p. A-7, infra).

FACTS

The uncontroverted facts surrounding the preparation and mailing of the denial letter reveal that the letter was typed and dated by Concetta Housewright, an FAA secretary, on November 19, 1986. It is also undisputed that Ms. Housewright placed the Schmidt denial notice in a letter size "penalty" envelope properly addressed to plaintiffs' attorney. A certified mail return receipt card was attached to the envelope containing the denial notice and it was deposited into an out-going box for mail (not a U.S. Post Office box) located in the office of the Chief Counsel for the FAA on November 19, 1986, for pick-up by the DDD Company, a private mail contractor. (A: A p. A-2-3, infra). It is also undisputed that the denial letter was received by plaintiffs' counsel on November 24, 1986. (A: A p. A-3, infra).

Concetta Housewright, testified that she had no recollection of November 19, 1986 nor of preparing the actual letter. (Defendant's Exhibit A, Housewright Depo p. 25, 34, 63) She testified that the FAA did not have anything in their file from the

United States Postal Service indicating when the Schmidt denial letter was mailed. (Defendant's Exhibit A, Housewright Depo p. 57) Nor did the FAA keep a record of the time or date when the private mail contractor picked up the denial letter from its office. (Defendant's Exhibit B, Leeman Depo p. 9, 14) The only evidence the FAA had in its file as to the mailing date was the November 19, 1986 date on the letter itself. She further stated that if the Schmidt denial letter was not mailed on November 19, 1986, it would have been destroyed. (Defendant's Exhibit A, Housewright Depo p. 73-74) The FAA subsequently admitted the letter was not mailed on November 19, 1986. (A; J p. A-24-25, infra).

Vickie Leeman, the FAA staff attorney assigned to this case, testified that the letter was mailed on November 20, 1986 and not on November 19, 1986 and further that the letter was not mailed on the day it was signed, nor did she know when it was signed. (Defendant's Exhibit A, Leeman Depo p. 13, 20, Defendant's Exhibit No. 22, pg. 4) The government ultimately admitted that the FAA had no written plans, procedures or guidelines for mailing claim denial letters by certified mail. (Plaintiff's Exhibit 60)

The FAA employees used three separate methods to "certify" denial letters. Some would prepare their own green receipt card completely and take the letter to a U.S. post office for a stamped time dated senders receipt. (Plaintiffs Exhibit 61) Some would prepare the green card completely and mail the letter themselves in the U.S. mail box at the Department of Transportation building thereby bypassing the DDD mailroom in that building. Finally some would complete the green receipt card minus the article number and thereby employ the services of the DDD mailroom who would assign the article number and place "certified" mail in a tray for eventual collection by the U.S. Post Office. (TR. Vol. A, p. 41, 52-54)

In the instant case, the FAA elected not to obtain their own Post Office sender's receipt or deposit the letter in the U.S. mail themselves but rather elected to use the services of the DDD Company, a private mail contractor.

Thus, since the government had no Post Office sender's receipt nor any evidence in its file concerning the mailing date and method it used to "certify" the letter, it sought to prove these facts through the testimony of Barbara Hemby, the DDD assistant supervisor, who worked in the central DDD mailroom in the D.O.T. building in November, 1986.

The FAA offices were located on the 9th floor of the Department of Transportation building in Washington, D.C. The DDD Company maintained a mailroom on the first floor of said building. The DDD Company provided mail clerks who picked up the mail four times each day from all the federal agencies in the D.O.T. building. Pick-ups were at 9:00 a.m., 11:00 a.m., after lunch and at 3:15 p.m. (TR Vol. A, p. 49-51) The DDD clerks do not provide the FAA offices any receipt for "certified" mail when they pick it up at the individual offices. When the DDD clerks pick-up the mail at the individual offices, they bring it, after each pick-up, to the central mailing room on the first floor for sorting. (TR. Vol A,p. 41).

Barbara Hemby testified when she received a "certified" letter from a clerk it was her duty to assign an article number to the green card if the original sender had not assigned one. (TR. Vol. A, p. 41) Her procedure then was to log the article by number, name and address in a DDD logbook she maintained as part of DDD's records. (TR. Vol. A, p. 41, 52-54). The court found this particular letter was entered by Ms. Hemby in her log book on November 20, 1986. (A: A p. A-3, infra). After the article had been logged, she would then take the letter as part of her procedure and place it in an outgoing letter tray in her office. (TR. Vol. A, p. 67). This tray is not a post office mail box and it is not locked. At some point in the day a DDD clerk would then remove the letters in that tray and place them in a tub which would be removed either to the door of the FAA mailroom or to the loading dock on the other side of that door for pick-up by the United States Postal Service. (Defendant's Exhibit I, Croston Depo p. 21-23)(TR Vol. 3, p. 394-397).

The mail would then be transported to the United States Post Office where it would be processed for delivery. FAA certified letters would not go through the post office facing machine nor would they go through the post office cancelling machine because they were in "franked" envelopes. (Defendant's Exhibit I, Croston Depo p. 55). Thus, there is no way the recipient can tell from the envelope itself when the letter was mailed because the envelope was not date stamped or post marked. (Defendant's Exhibit G, Bailey Depo p. 34-39).

In her first deposition, Barbara Hemby testified that she treated certified mail just like regular mail with no difference. However, in her second deposition and at trial, she testified that certified letters have "top priority" and that certified mail was "priority mail". (TR. Vol. A, p. 152-153). She further admitted at trial that she did not have any independent recollection of the entries that were on the firm mailing book for November 19, 20 and 21, 1986. (Vol. A, p. 152). She testified that she did not specifically remember these three days and that her testimony was based on the usual things that occur at work. (TR. Vol. C. p. 399).

At her initial deposition, Barbara Hemby testified on two occasions that she was not required to keep any records on certified mail. At her second deposition and at trial, she testified that the D.O.T. required her to keep the article numbers of the certified mail that went out. (TR. Vol. A, p. 155, Vol. C p. 400). She admitted that such a requirement was absolutely pointless because she would be unable to match article numbers without additional information. She insisted, however, that this was the D.O.T. instruction. (TR. Vol. A, p. 155-156).

Hemby stated at trial that there was a box on her log book page for the postman to sign for certified mail. She did not ask the postman to receipt the log book page for the date in question in November, 1986 and testified that he would not have receipted it even if she would have asked. (TR. Vol. A, p. 158-159).

Steve Croston, the supervisor of government mail in Washington, DC, testified that certified mail was accountable mail and that the post office would sign for it if requested. (Defendant's Exhibit I, Croston Depo p. 52) He testified that the postal service signs for *all* certified mail at the Naval District of Washington, D.C., a stop under Mr. Croston's jurisdiction, the same as the D.O.T. building and further that a mailman could be subject to discipline if he refused to sign for certified mail. (Exhibit I, Croston Depo p. 45-46). Croston also confirmed the fact that the log book for November, 1986 had a special box on each page for the post office to receipt each days mail. (Defendant's Exhibit I, Croston Depo p. 27).

Robert L. Shaw, a senior mathematical statistician for the United States Post Office, testified that it would be impossible for the post office or anyone to determine the date of mailing of any letter that was mailed by first class mail in a penalty or franked envelope if that envelope wasn't postmarked or date canceled by the U.S. Postal Service. (Defendant's Exhibit H, Shaw Depo p. 24-25).

Bryan A. Bailey, manager of the Service Statistical Branch within the Service Information Division of the United States Postal Service, testified that no one could determine the date of mailing of any letter that is mailed by first class mail in a penalty or franked envelope if that envelope isn't post-marked or date cancelled by the U.S. Postal Service and that such mail is *not* post-marked or date cancelled by the U.S. Postal Service. (Defendant's Exhibit G, Bailey Depo p. 34-39).

From these facts, the District Court ruled that the FAA letter of denial of plaintiffs' claim was mailed on November 20, 1986 by certified mail and that the filing of plaintiffs' complaint on May 21, 1987 was not timely and that equitable tolling did not apply.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL COURTS ARE DIVIDED ON HOW TO COMPUTE THE LIMITATIONS PERIOD IN A FTCA CASE AND THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' ACTION REGARDLESS OF WHETHER THE DENIAL LETTER WAS MAILED ON NOVEMBER 20, 1986 OR NOVEMBER 21, 1986 BECAUSE PURSUANT TO THE *IRWIN* AND *SCHMIDT* DECISIONS THE PLAINTIFFS' CLAIM WAS TIMELY FILED

There is a division among the Circuits as to how to compute the actual six month limitation period in FTCA cases.[3]

There are presently three different methods in use that inequitably give different lengths of time to claimants depending on such things as in which Circuit they reside, what day of the month the letter was filed, and if the Federal Courthouse is open on Saturday.

The Eighth Circuit has historically used the method set out in *McDuffee v. U.S.*, 769 F.2d 492 (8th Cir., 1985) in calculating the limitations period in FTCA cases. This is the method apparently used by the District Court in this case. Plaintiffs state that the reasoning in *McDuffee* has been rendered obsolete by the Supreme Court in *Irwin v. Veterans Administration*, 789 U.S. 89; 111 S.Ct. 453; 112 L.Ed. 2d 435 (1990) and by the 8th Circuit in *Schmidt v. U.S.*, 933 F.2d 639 (8th Cir. 1991).

Plaintiffs further assert that the law in *Irwin* and *Schmidt II* affords the Supreme Court an opportunity to correct not only the

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[3] The 8th Circuit Court of Appeals stated in a footnote in its unpublished ruling that this issue "apparently" was not raised in the district court and thus was not properly before the court (A: B p. A-6, infra). Plaintiffs, however, point out that the district court stated that the action before the Court for trial was "those issues related to whether this action should be dismissed because plaintiffs failed to commence this action within the six-month period set forth in 28 U.S.C. Section 2401(b)". (A: A p. A-2, infra).

division that exists in the Federal Courts but also the inequities incident thereto.

Basically the three different methods used are:

METHOD 1

This method holds that the triggering day counts and that the last day in the period is the anniversary day less one.

> E.g. Date letter mailed November 20, 1986; ergo 6 month anniversary day = May 20, 1987, less 1 day = May 19 as the last day within the period.

This method was followed by the 6th Circuit in *Rust v. Quality Car Corral, Inc.*, 614 F.2d 1118 (6th Cir. 1980). This method reasoned that the limitation period was jurisdictional and Rule 6(a) F.R.C.P could not be invoked until the Court *had* jurisdiction. This method is obviously passe since *Irwin* and *Schmidt II* have ruled that the Statute of Limitations is not a jurisdictional prerequisite but rather just an affirmative defense.

METHOD 2

This method holds that you did *not* count the triggering day but rather started counting on the day after the triggering event and concluded with the anniversary day of the triggering event.

> E.g. Letter mailed on November 20, 1986, count starts on November 21, 1986 and concludes on May 20, 1987, the anniversary date of the triggering event.

This method reasoned that the court should follow Rule 6(a) F.R.C.P. despite the fact that the Courts were still stating that Section 2401(b) was part of the government's waiver of Sovereign Immunity and thus was a jurisdictional prerequisite not subject to equity. This method found support in the majority of jurisdictions. *Tribue v. United States*[4], 826 F.2d 633 (7th Cir.

[4] Tribue, however, actually added an additional day or days when the mailing date was the last day of the month. Thus a letter mailed on February 28 would give the plaintiff until August 31, a period of 184 days. The court noted the inequity in giving some plaintiffs more time than others.

1987); *Kollios v. United States*, 512 F.2d 1316 (1st Cir. 1975); *Frey v. Woodard*[5], 748 F.2d 197 (3rd Cir. 1984).

METHOD 3

This method was the same as method 2 except that it stated the period should end on the anniversary date of the first counting day and not the anniversary day of the triggering event.

> E.g. Triggering event day November 20, 1986, then first counting day is November 21, 1986, and anniversary of first counting day is May 21, 1987.

Again these cases were still stating that Sec. 2401(b) was a jurisdictional prerequisite because it was part of the Sovereign Immunity waiver of the Federal Tort Claim Act. *Bledsoe v. Department of Housing and Urban Development*, 398 F.Supp. 315 (E.D. Pa. 1975); *Rodriguez v. U.S.*, 382 F.Supp 1 (D.C. Puerto Rico 1974).

Thus, as stated, all three of these methods were pre-*Irwin* and still held that Section 2401(b) was part of the government's waiver of Sovereign Immunity and thus a prerequisite to jurisdiction.

Title 28 Sections 2674 and 2675(a) U.S.C.A. contain the government's actual waiver of Sovereign Immunity in Federal Tort Claims cases. Section 1346(b) confers exclusive jurisdiction on the Federal District Courts for claims arising out of the waiver expressed in Sections 2674 and 2675(a). Section 2401(b) is a separate limitations statute applicable to the Sovereign Immunity waiver.

The Courts had long held that without the Waiver of Sovereign Immunity, the Courts would have no jurisdiction, thus ergo the waiver is jurisdictional and must be strictly construed. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). This strict construction of Sovereign Immunity was historically applied to

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[5] Frey extended 2401(b) by two days using Rule 6(a) despite the fact that the Court was open on Saturday, the last filing day.

these four Sections of the Act and thus such things as equitable tolling and the Federal Rules of Civil Procedure could not be applied to any of the sections because they only applied *after* the court *had* jurisdiction.

Thus pre-*Irwin*, the Courts could not apply the Federal Rules of Civil Procedure or equitable tolling to a FTCA case because Section 2401(b) was held to be part of the waiver of Sovereign Immunity expressed in Title 28 Sections 1346(b), 2674 and 2675(a) U.S.C. Therefore, compliance with Section 2401(b) was held to be a jurisdictional prerequisite to suing the government.

However, the Supreme Court in *Irwin* expressly held that Statutes of Limitations in suits against the government *are* subject to equitable tolling. Ergo, Section 2401(b) is *not* a jurisdictional prerequisite to suing the government. The Eighth Circuit clearly expressed this law in *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991).

> Necessary to this expressed holding is an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government. If the statute of limitations were jurisdictional, the court would have no power to consider tolling it.

The Court in *Schmidt* then went on to state that the FCCA's Statute of Limitations (2401(b) "*is not jurisdictional*" but rather is "*merely an affirmative defense*". *Schmidt II* p. 640; *Diltz v. U.S.*, 771 F. Supp. 95 (D.Del. 1991); *Goldbach v. Sullivan*, 779 F.Supp. 9 (N.D.N.Y. 1991); *Slaaten v. U.S.*, 990 F2d 1038 (8th Cir. 1993).

By so holding it is perfectly clear that Section 2401(b) is not part of the government's waiver of Sovereign Immunity contained in Title 28 Sections 1346(b), 2674 and 2675(a), but merely and purely a statute of limitations that is an affirmative defense subject to equitable tolling and the Federal Rules of Civil Procedure. To hold otherwise now would be like a parrot

repeating words without any understanding of their meaning, each subsequent case in the chain citing a standard that has lost its anchor. *See Remington Arms Co. v. Liberty Mutual Ins. Co.*, 796 F. Supp. 117 (D.Del. 1992).

In short, limitations are a matter of defense rather than an element of the claim. Limitations are not a built-in time bar to jurisdiction. *Perkins v. United States*, 76 F.R.D. 590 (W.D. Okl. 1976).

In *Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1990) the court held citing *Irwin* that the 60 day limitation statute in Social Security cases was merely a statute of limitations and not a jurisdictional bar to the Federal Courts.

Rule 6 F.R.C.P. governs the time computation of Federal lawsuits and must be liberally construed. *Wirtz v. Local Union 611 Intern. Hod Carriers'*, 229 F. Supp. 230 (D.C. Conn. 1964). This liberality and leniency that was referred to by the Supreme Court in interpreting 28 U.S.C. Section 2101(c) in *Union National Bank v. Lamb*. 337 U.S. 38 93 L.Ed. 1190; 59 S. Ct. 911 (1949) should be logically extended to Section 2401(b).

Rule 6(e) F.R.C.P. provides:

> (e) **Additional Time After Service By Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Prior to *Irwin* the courts held that Rule 6(e) did not apply to FCTA cases because limitations were considered jurisdictional in these cases and thus part of the waiver of Sovereign Immunity, ergo, the courts could not enlarge the waiver. *Robinson v. Celebrezze*, 237 F.Supp 115 (E.D. Tenn S.D. 1964); *Whipp v. Weinberger*, 505 F.2d 800 (6th Cir. 1974). These cases are obviously overruled by the holdings in *Irwin* and *Schmidt II*.

The only pre-*Irwin* and *Schmidt II* case that discusses the applicability of Rule 6(e) other than in jurisdictional terms is *Carr v. Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975). Although *Carr* initially decides the case based on the premise that Section 2401(b) is jurisdictional and thus a part of the Sovereign Immunity waiver, it goes on to analyze Rule 6(e) assuming, arguendo, that the period of limitations is not jurisdictional. A close review of this analysis reveals serious flaws and inaccuracies in interpreting Rule 6(e).

Initially *Carr*, using a strict construction of Rule 6(e), focuses on the distinction between the statutory language of Section 2401(b) and Rule 6(e) holding that the period of limitations commences with the "date of mailing", and not with the "service of notice or other paper" as provided in Rule 6(e). This tortured distinction is logically and practically inconsistent with the purpose and application of Rule 6(e). "Service" as used in Rule 6(e), is deemed complete through the application of Rule 5(b) Federal Rules of Civil Procedure upon the *mailing* of a notice, not its receipt. The three days are added to the prescribed period to account for a reasonable mailing time so as not to penalize the respondent by *robbing* him of time to respond.

Logically, if "service" meant receipt, there would be no purpose in granting additional days for response. This is supported by decisions ruling that Rule 6(e) does not apply to cases where the time period commences from the day the party actually receives notice. Rule 6(e) is to compensate for mailing time and, as such, is "irrelevant and inappropriate" unless the triggering day is the mailing day. *Mosel v. Hills Department Store*, 789 F.2d 251 (3rd Cir. 1986).

Section 2401(b) is exactly the type of statute which Rule 6(e) was designed to address as the operative date is the date of mailing. Rule 6(e) therefore, should be used to figure a reasonable transmission time from the time of mailing to the time of receipt so not to rob claimants of these days to respond.

As explained in Miller Federal Practice, Rule 6(e):

> *clearly is intended to protect parties who are served notice by mail from suffering a systematic diminution of their time to respond through the application of Rule 5(b), which provides that service is complete upon mailing, not receipt;* the additional three days provided by Rule 6(e) to the party being served represent a reasonable transmission time, and a fair compromise between the harshness of measuring strictly from the date of mailing and the indefiniteness of attempting to measure from the date of receipt, which in many cases would be unverifiable. *By contrast, when a statute calls for a time period within which a party must do some act and the time period commences only after actual receipt of notice, Rule 6(e) should not be applied to extend the period*; by providing for commencement upon receipt the statute protects the party being served from any harsh effects of Rule 5(b), and the application of Rule 6(e) enlarges the statutory period for no apparent purpose. *Miller Fed. Practice and Procedures*, Volume 4A, Chapter 3, 2nd Ed. 1987, p. 514-15. (Citations omitted)

Carr also attempts to distinguish the application of 6(e) from application to suits against the government by indicating that the "probable purpose" of Rule 6(e) is to equalize the time for action available to parties served by mail that is afforded to those personally served. The court thus felt that 6(e) was not relevant to 2401(b) since everyone is served by mail and thus the period commences in the same way for all claimants. *Carr* at 1357. *Carr* cites no authority for this reasoning and, on its face, requires the strictest of conservative interpretations of Rule 6(e) to arrive at this end.

As stated previously, it is universally accepted that the Rules of Civil Procedure are to be liberally construed. Nowhere in Rule 6(e) does Congress explicitly exclude any specific type of "notice" or "paper" from its application. It only requires that the "notice or paper [be] served upon the party by mail" and that the

party then has a prescribed period after the service of this notice "to do some act or take some proceedings". All of these requirements are specifically met by the terms of Section 2401(b) requiring filing of suit within a prescribed time period after the mailing of a denial notice. There is nothing in the language or the construction of Rule 6(e) excluding notices which are mandatorily mailed. They are clearly within the scope of this rule. [As a practical matter, nearly all notices in Federal litigation are served by mail in modern day litigation. To make the distinction between notices which can be mailed or served in person and those mandatorily mailed is to ignore the practicalities of the modern litigation process.]

In the prophetic case of *Frey v. Woodard*, 748 F.2d 173 (3rd Cir. 1984) the Court rejected the government's interpretation [of Section 2401(b)] that *all* statutes involving its waiver of Sovereign Immunity should be given a "niggardly" interpretation which would deny benefits of the waiver whenever possible. The Court paraphrased this position as "the government's rule of interpretation is that the claimant ought always to lose" *Frey* p. 175. The Court not only rejected the government's position, but further stated that 2401(b) was "ambiguous". *Frey* p. 175.

The Supreme Court in 1955 admonished the Courts not to regard themselves as the "self-constituted guardians of the Treasury by importing immunity back into a statute designed to limit it" *Indiana Towing Co., Inc. v. United States*, 350 U.S. 61,69, 76 S. Ct. 122, 126, 100 L.Ed. 48 (1955).

Therefore, in light of *Irwin* and *Schmidt II*, this case affords the Supreme Court an opportunity to set a method for FTCA cases that is clear, equitable and easy to determine; a method that is ascertainable by both parties and in line with the rulings, both expressed and implied, in both cases. A method that will bring conformity to the present division among the circuits. A method that will equitably give all claimants equal time access to the Federal Courts where ever they reside. A method that uses Rule 6 which is not an attempt to change a jurisdictional statute but as

stated by the Fifth Circuit, a method that merely provides a statutory construction of time computation:

> "The rule does not attempt to change a jurisdictional statute, but merely provides a method of computing the statutory period different from that fixed by judicial decision." *Wilson v. Southern Ry. Co.*, 147 F.2d 165, 166, (C.A.5th, 1945).

A method that uses Rule 6 not only for the aforestated reasons but also, since Rule 6 was enacted *prior* to Section 2401(b) and since Congress did not exempt 2401(b) from the F.R.C.P., it is reasonable to conclude Congress meant 2401(b) to be subject to Rule 6. *Wilkes v. United States*, 192 F.2d 128, 129 (5th Cir. 1951); *Union National Bank v. Lamb*, 69 S. Ct. 911; 337 U.S. 38; 93 L.Ed. 1190 (1949).

And further a method that will fulfill the congressional intent of "providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their government" *Senate Report No.* 1327, p. 2515-2516 (1966); *House of Representatives Report No.* 1532 p. 5 (1966).

The application of Rule 6(e) is a method that will prejudice no one, just as the application of Rule 6(a) has found acceptance.

> It is difficult to perceive how a legitimate governmental interest would be prejudiced by application of the Rule 6 exclusion of final Saturdays, Sundays, and legal holidays to federal statutes of limitations. This exclusion would delay the expiration of a given period by, at most, two or three days, which is unlikely to inconvenience or prejudice anyone. *Wright & Miller Fed.* Practice and Procedures Volume 4A, Chap. 3, 2nd Ed. 1987, p. 469.

It is clear that there is an inconsistent application of the six month time computation contained in Section 2401(b). Many of the courts' accepted methods of computation are based on the obsolete presumption that Section 2401(b) is jurisdictional in

nature and thus not subject to the Rules of Civil Procedure. Thus for the aforementioned reasons, the Supreme Court should address these issues through the acceptance of this application for certiorari.

II

THIS DECISION IS A CASE OF FIRST IMPRESSION LEGALLY DEFINING THE ELEMENTS THAT CONSTITUTE "CERTIFIED MAIL" AS USED IN 28 U.S.C. §2401(b) AND BY NARROWLY CONSTRUING SAME, CONFLICTS WITH OTHER SIMILAR STATUTORY INTERPRETATIONS

The District Court found that the FAA claim denial letter was mailed by certified mail to plaintiffs' attorney. The Court of Appeals concluded that this finding was not clearly erroneous. (A: A and B p. A-1-5, infra) 28 U.S.C. §2401(b) provides, in part, that a tort claim against the United States shall be forever barred unless action is begun within six months after the date of mailing, *by certified or registered mail*, of notice of final denial of the claim by the agency to which it was presented. (Emphasis added). The statute is specific in the manner in which the denial letter must be mailed by the federal agency - certified or registered mail.

Since the statute commences to run once the denial letter is mailed, the exact date of that mailing and not the date of the receipt of the letter is the critical date. Plaintiffs have found no cases under the Act which have addressed the question of what specifically constitutes certified or registered mailing. A definition of certified mail is found in the postal service rules and regulations. Certified mail service "is a service that provides a mailing receipt to the sender and a record of delivery at the office of address". 39 CFR Ch. III, Pt. 3001, Subpt. C, App. A, Sec. 5.01.

The Domestic Mail Manual, a manual which contains the regulations of the U.S. Postal Service governing its' domestic mail services, also contains a description of certified mail

service. There it is said, in part, that "certified mail service provides the sender with a mailing receipt and a record of delivery at the office of address." Domestic Mail Manual, Sec. 912.1(a). Registered mail is similarly described in the Domestic Mail Manual as incorporating a system of receipts to monitor the mail's movement from the point of acceptance to delivery. Domestic Mail Manual, Sec. 911.11.

A somewhat similar situation to this case was presented in the case of *Lindemood v. Commissioner of Internal Revenue*, 566 F.2d 646 (9th Cir. 1977). In that, a tax court case, the taxpayers argued they sent timely petitions for redetermination of deficiencies to the Internal Revenue Service in an envelope designated as certified mail which was stamped with sufficient postage by a private postage meter. The United States Postal Service did not stamp or mark either of the envelopes in which the petitions were mailed nor either of the sender's receipts for certified mail. The only postmark date on the envelopes was made by the taxpayers own private postage meter. The taxpayers relied, in part, on a federal regulation applicable in tax cases that provided that "if the document is sent by U.S. certified mail, and the sender's receipt is postmarked by the postal employee to whom such document is presented, the date of the U.S. postmark on such receipt shall be treated as the postmark date of the document." *Lindemood* at 649. The court thus held that since the sender's receipt for the letters were not marked by a postal employee, they did not bring themselves within the certified mail regulation.

The U.S. Court of Appeals for the Eighth Circuit in its vacated judgment in this case had held that the facts presented at that time did satisfy the statutory requirement of 28 U.S.C. §2401(b). (*Schmidt v. United States* 901 F.2d 680 (8th Cir. 1990) However, on remand at the bifurcated trial, plaintiffs introduced evidence on this issue that was previously not before the Court. To-wit:

A. The governments admission that the FAA took some of its certified mail directly to the post office to obtain a senders receipt. (Plaintiffs' Exhibit 61)

B. The fact that the postman would have receipted the log book if requested and could have been subject to discipline if he refused. (Defendant's Exhibit I, Croston Depo p. 45-46)

C. The fact that the post office receipts all certified mail at the U.S. Naval station in Washington, DC because the Navy requests it. (Defendant's Exhibit I, Croston Depo p. 45-46)

D. The fact that the FAA had no written plans, procedures or guidelines for mailing claim denial letters by certified mail. (Plaintiffs' Exhibit 60: App. 53)

E. The fact that there was a date time stamp machine in the FAA mailroom in November, 1986. (Defendant's Exhibit E, Dilks Depo p. 16)

F. That since October, 1989, the FAA now meter date stamps all the mail leaving the DDD mailroom. (Defendant's Exhibit F, Sherman Depo p. 46)

G. The FAA knew, prior to mailing the notice of denial of Plaintiffs' claim, that the notice was being mailed in a penalty or franked envelope that would bear no postmark or cancellation date when received by plaintiffs' attorney indicating the date it was mailed by the FAA. (Defendant's Exhibit A, Housewright Depo p. 52-53, 70-72)

H. The FAA knew, prior to mailing the notice of denial to Plaintiffs' claims, that neither the notice letter to Plaintiffs' attorney nor the envelope in which it was sent stated anywhere the date it was mailed. (Defendant's Exhibit A, Housewright Depo p. 28-29, 72)

The FAA mailing of this denial letter under the facts of this case as now presented was not a mailing by certified or registered mail. The FAA attached the green return receipt card to the denial letter but that card merely monitored the acceptance of the

letter by the addressee. Neither the FAA or DDD obtained a stamped sender's receipt from either the post office or the postman as they easily could have done and actually did on some letters. The entries made in the DDD log on November 20, 1986 are analogous to the private postage meter marks the taxpayers in *Lindemood* placed on their envelopes. The entries provide no independent proof of mailing without a postmarked receipt by a postal employee. A receipt that at least one other federal agency (the Navy) always acquires. Such a receipt would show the acceptance date by the postal service — the date of mailing. The important question concerning the commencement of the six month limitation period could have thereby been resolved with certainty. See Collins, *The Validity of Postmarks*, 47 ABAJ 371, 374 (1961).

Moreover, the procedures employed by the FAA in this matter were questionable in view of the importance of establishing the precise mailing date. The FAA has no record of its own of the mailing of the denial letter but rather has left this important duty to a third party. The DDD Co., through its log, has merely maintained a record of the receipt of the denial letter from the FAA and has no documentary evidence of its mailing. It seems strange that as important as the date of the mailing of a statutory denial letter might be that the FAA would not have obtained a sender's receipt if DDD did not provide one with their mailing service.

This is not the first case in which the method of mailing denial letters by the FAA has been questioned. On December 5, 1985, the FAA mailed a claim denial letter to the attorney for Jerome M. Johnson by regular mail and not by certified or registered mail as §2401(b) required. *Johnson v. United States*, 652 F.Supp. 407 (E.D. Va. 1987) The United States in that case moved to dismiss Johnson's complaint which was filed on October 5, 1986, arguing that the defect in mailing was harmless because Johnson's attorney actually received the letter by December 12, 1985. The court agreed with Johnson's contention

that the failure of the FAA to mail the letter by "certified or registered mail" barred the United States from asserting the six month period of limitations. The court stated that:

> "The requirement of registered or certified mail provides certainty and avoids disputes over whether plaintiff actually received the final denial. Congress could have written the statute to provide an exemption for cases in which there was actual receipt."

Johnson, at 409.

It has been said that 28 U.S.C. §2401(b) must be strictly construed. *Childers v. United States*, 442 F.2d 1299 (5th Cir. 1971). That strict construction of the statute should apply equally to the duties of the government under the law as well as the duties of the plaintiffs. The Act does waive the immunity of the United States and in construing the statute of limitations a court should not narrow the waiver that Congress intended. *United States v. Kubrick*, 444 US 111, 100 S.Ct. 352 (1979), 62 L.Ed.2d 259.

Congress specified in 28 U.S.C. §2401(b) two methods of mailing denial letters, each of which would've provided the FAA with proof of the date of mailing through a post office employee. It must be assumed that Congress intended that these methods of receipts for sending and accepting the denial letters would resolve disputes over such mailing and avoid litigation that might follow. This court should strictly construe §2401(b) and find that in light of the new evidence adduced at trial that this denial letter mailed to the plaintiffs by the FAA was not mailed in compliance with the statute and was ineffective to trigger the running of the statute of limitations against plaintiffs.

If the notice of denial mailed by the FAA to plaintiffs' attorney did not constitute a notice of final denial pursuant to 28 U.S.C. §2401(b), because it was not mailed by certified mail, the six months limitation period imposed upon plaintiffs did not begin to run in this case regardless of whether the denial letter was

mailed on November 20, 1986 or November 21, 1986. Title 28 U.S.C. §2675(a) provides, in part:

> "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section."

The courts have held that 28 U.S.C. §2675(a) and the statute of limitations of 28 U.S.C. §2401(b) are to be read together. *Leonhard v. United States*, 633 F.2d 599, 624 (2nd Cir. 1980), *Chambly v. Lindy*, 601 F. Supp. 959, 963 (W.D. Pa. 1985)

It is plaintiffs position that the mailing by the FAA of the denial letter to plaintiffs' attorney did not constitute mailing by certified mail within the requirements of §2401(b) and the intent and purpose of that limitations statute. Since the FAA failed to deny plaintiffs administrative claim in the manner required by statute, by mailing the denial by certified or registered mail, plaintiffs were only obligated to comply with the two year statute of limitations requiring presentment of their claim to the appropriate federal agency within two years of the date of its accrual. *Johnson v. United States*, 652 F. Sup. 407, 409 (E.D. Va. 1987).

The case of *Miller v. United States*, 741 F.2d 148 (7th Cir. 1984), presented a situation similar to the case at bar. The denial letter sent by the federal agency to the plaintiffs in that case did not deny their claim on its face and the agency, the postal service, did not send the letter by certified or registered mail. The court in that case determined that pursuant to 28 U.S.C. §2675(a) if the federal agency fails to finally dispose of a properly made claim within six months of its presentation, the claimant had the option to treat the inaction as a constructive final denial. Since the postal service had not finally denied the claim by the denial letter which they sent, and since the letter was defective itself, the plaintiffs could exercise that option at any reasonable time by thereafter filing suit. *Miller v. United States*, at 151.

In the case at bar, the denial letter mailed to plaintiffs' attorney by the FAA did not constitute a final denial by the agency pursuant to 28 U.S.C. §2401(b). Under 28 U.S.C. §2675(a) the plaintiffs had the option of treating the failure of the agency to finally deny as a constructive final denial and the filing of their complaints on May 21, 1987 should be so considered. *Pascale v. U.S.*, 998 F.2d 186, 192-193 (3rd Cir. 1993), *Chambly v. Lindy*, id. 963-64, *Boyd v. United States*, 482 F. Supp. 1126, 1129-30 (W.D. Pa. 1980), *Mack v. United States Postal Service*, 414 F. Supp. 504, 507-8 (E.D. Mich. 1976).

The limitations defense of the United States should have been denied since the mailing of the denial letter to plaintiffs' attorney by the FAA did not constitute a final denial of plaintiffs' claim by certified mail, and, more than six months having elapsed since the plaintiff's filed their administrative claim, they had the right to consider the FAA's inaction as a constructive final denial and thereafter file suit in this matter as they did.

III

THE LOWER COURTS ERRED IN FAILING TO APPLY THE PRINCIPLES OF EQUITABLE ESTOPPEL AND TOLLING AS MANDATED BY *IRWIN* AND FAILED TO GRANT EQUITABLE RELIEF TO PLAINTIFFS

28 U.S.C. §2401(b) provides a plaintiff with six months time to file a lawsuit after the *mailing* of a denial letter by certified or registered mail. Filing on the last day of this six month period is certainly as good as filing on the first day. However, in this case, the actions of the FAA induced and tricked the plaintiffs into believing that the Statute of Limitations had run on May 19, 1987, when in fact the District Court ruled that the Statute did not expire until May 20, 1987, thus robbing plaintiffs of one days filing time.

It is clear that Section 2401(b) requires that the notice of denial be mailed by "certified or registered" mail so that the operative date, the date of mailing, can be determined by the plaintiff with

certainty. The mailing procedure by the FAA in this case simply failed to provide plaintiffs with notice of the actual date of mailing of this letter. This was so even though it was proved that the FAA certainly had the means and procedures in place to send a denial letter which would clearly and unmistakably provide the recipient with its date of mailing. The defendant admitted that the FAA took *some* of its certified mail to the post office to obtain a verifiable stamped sender's receipt, thereby bypassing the DDD mailroom. (Plaintiffs Exhibit 61). Plaintiffs further proved that since 1989, all mail leaving the DDD mailroom has been date stamped. (Defendant's Exhibit F, Sherman Depo p. 46). However, in this case, the FAA did not request the sender's post office stamped receipt available through certified or registered mail procedures that would have evidenced the date of mailing of this letter. It was also proved beyond question that this denial letter was mailed in a franked envelope containing no date cancellation or date postmark. Thus, there was absolutely no way plaintiffs could tell by the envelope when the statute commenced. (TR Vol. C, p. 462).

It is obvious that Congress specifically required mailing by certified or registered mail to avoid just this situation. As the operative date triggering this statute is the date of mailing, proof of this date is *essential*. Thus, by inserting the language "by certified or registered mail", Congress specifically provided an independent, objective mechanism intended to provide the recipient with the exact date of mailing. However, the FAA's practice of using a private mail contractor, sending it by postmark free "franked" mail, and failing to request a stamped sender's receipt and postmarked envelope clearly did not provide plaintiffs with any means by which to verify the date of mailing. Although this method was presumably efficient for the FAA's voluminous daily first class mail needs, it was clearly not within the spirit and intent of this statute.

In *Raddatz v. United States*, 750 F.2d 791, 1984, the 9th Circuit addressed the sufficiency of a denial letter sent per

Section 2401(b), and specifically focused on the denial letter's "effectiveness in light of the clear requirement of statutory provisions." Thus, when focusing on the "effectiveness" of the government's denial letter in this case, it is clear that the government's conduct was wholly *ineffective* to determine the exact date of mailing, as Congress had obviously intended.

The denial letter itself was dated November 19, 1986. The government initially alleged in its Motion to Dismiss that this date was the date of mailing of the letter. (A: I P., A-22, infra). However, the government eventually admitted in an Amended Motion to Dismiss, that the date on the letter was *not* in fact the date it was mailed. (A: J p. A-24, infra). Therefore, there was absolutely no objective, verifiable information contained in the letter itself indicating the date of mailing of this denial letter.

The plaintiffs were led by the FAA to detrimentally rely on the incorrect date of November 19, 1986 as the date of mailing of this letter. As such, plaintiffs had one more statutory filing day (based on the District Court's ruling) that they were totally unaware of. A date the plaintiffs were robbed of because of the defective notice and actions of the defendant. It was on this date, May 20, 1987, that plaintiffs detrimentally relied on the government's representation that the letter was mailed on November 19, 1986. Given the Eighth Circuit's interpretation of 2401(b) at that time, plaintiffs understandably assumed the Statute of Limitations had run the previous day so that the complaint was mailed from St. Louis to Omaha. Had plaintiffs known on May 20 the actual date of mailing, they could have faxed the complaint to Omaha, had local counsel file it, or flown it themselves to Omaha. However, not knowing of this day, the complaint was simply mailed, thereby not arriving until May 21, 1987.

It was shown at trial that it was the FAA's policy at that time to "destroy" all denial letters which were not mailed out on the letters date. (Housewright Depo p. 74). Yet in this case, the government did not destroy this letter. The government did not correct the misconception created by their misconduct at any

time during the statutory filing period. It was only when the plaintiff put the government to proof of the mailing date that the government admitted its misconduct and amended its Motion to Dismiss.

The Supreme Court in *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990) held equitable principles are applicable to Statute of Limitations defenses and suits against the government. Equity dictates that when the conduct of one party places the other party in a situation where his rights will be prejudiced or imperiled, he should be subject to the principles of equitable estoppel. As stated by the Supreme Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (232-233) 1959, equitable estoppel has frequently been employed to bar inequitable reliance on Statutes of Limitation, relying on the maxim that "no man may take advantage of his wrong". Additionally, courts have generally reserved the application of equitable principles for conduct of the defendant that lulled plaintiff into inaction. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 and n.2 (8th Cir. 1989).

Clearly, the FAA's misconduct in failing to request a stamped sender's receipt, using a franked envelope containing no date cancellation or date postmark, and mailing this denial letter after the letters date, induced plaintiffs into thinking the Statute of Limitations had expired on the previous day and robbed them of the knowledge that one additional day was available for them to file their complaint. A day just as good as any other day in the six month period. This lack of knowledge caused by the conduct of the defendant in this case so severely prejudiced and imperiled the plaintiffs of their rights that a dismissal has ensued.

Most importantly, allowing the government to take advantage of its misconduct and mail denial letters after their stated date simply allows the government to unilaterally circumvent the full six month limitations period as expressly intended by Congress. Plaintiffs will always have to rely on the stated date of the letter if no sender's receipt or postmark is available. If the denial letter

can pre-date its date of mailing, as in this case, then the government has effectively shortened the time limit.

Based on the facts adduced at the district court hearing and presented to this court, there can be no question that plaintiffs detrimentally relied on government's negligent misrepresentation of the date of mailing. As such, this case cannot be classified as "garden variety neglect" on the part of plaintiffs as it was the government's own action which induced the one day delay in the filing of this lawsuit.

Plaintiffs urge the court to grant certiorari in order to consistently apply the principles of equitable estoppel and tolling as set out in *Irwin* and to bar defendant from its inequitable reliance on its Statute of Limitations defense.

CONCLUSION

For these various reasons, petitioners respectfully submit that these issues should be addressed through the acceptance of this application for certiorari or in the alternative, that the Court enter an order summarily disposing the issues on the merits and remand this case to the District Court for final disposition.

Respectfully submitted,

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APPENDIX

APPENDIX A

(IN OPEN COURT)

[482]

July 9, 1992

4:43 p.m.

THE COURT: Please be or remain seated. The following constitute my Findings of Fact and Conclusions of Law in this case. My Findings of Fact so made are made upon the basis of having been proved by the standard of proof of the preponderance of the evidence or the greater weight of the evidence. I reserve the right in the event of an appeal to amend or supplement these Findings of Fact and Conclusions of Law, which are, of course, being announced here this afternoon from the bench following the close of the evidence.

1. Plaintiffs commenced this action on May 21, 1987 against the Defendant for recovery of damages under the Federal Tort Claims Act.

2. This Court has jurisdiction under 28 U.S.C. Section 1346 (b) and Section 2671 et seq.

3. Venue lies in this Court pursuant to 28 U.S.C. Section 1391(e).

4. Plaintiffs Phyllis and Earl Schmidt submitted an administrative claim to the Federal Aviation Administration, hereinafter referred to at times as the FAA, on November 6, 1985.

5. The FAA denied the Schmidt's administrative claim on November 19, 1987, and mailed a notice of its final [483] denial of the Schmidts' administrative claim that was received by Mr. John P. Madigan, Jr., Plaintiffs' counsel, on November 24, 1986.

6. That notice expressly warned Plaintiffs that if they were dissatisfied with the FAA's determination, Plaintiffs may "initiate action in an appropriate United States District Court, . . . not later than six months after the date of mailing of this notification."

7. Despite that warning, the Plaintiffs did not initiate this action against the United States until May 21, 1987.

8. This action is now before the Court for trial solely on those issues related to whether this action should be dismissed because the Plaintiffs failed to commence this action within the six-month period set forth in 28 U.S.C. Section 2401(b).

9. The United States claims that the Schmidt Denial Notice was mailed by certified mail on November 20, 1986, and moves the Court to dismiss this action on the grounds that Plaintiffs did not file this action within the six-month period required by 28 U.S.C. Section 2401(b).

10. Plaintiffs claim alternatively that the Schmidt Denial Notice was not mailed until November 21, 1986, or that if the Schmidt Denial Notice was mailed before November 21, 1986, the United States should be estopped from proving the **[484]** date on which the Schmidt Denial Notice was mailed because the United States misled the Plaintiffs as to the actual mailing date.

11. The parties have stipulated that the envelope addressed to Mr. Madigan, which contained the Schmidt Denial Notice and was attached to a Certified Mail Return Receipt, was deposited into an outgoing box for mail located in the Office of the Chief Counsel for the FAA on November 19, 1986.

12. On November 19, 1986, Ms. Housewright, the FAA secretary who prepared the Schmidt Denial Notice, presented the Schmidt Denial Notice to her supervisor, Mr. James S. Dillman, for his signature. Mr. Dillman was the Assistant Chief Counsel for the Litigation Division with the Office of the Chief

Counsel for the FAA and had authority to sign the Denial Notice and did sign the Denial Notice on November 19, 1986. On that same date, November 19, 1986, Ms. Housewright prepared the typed information on a green Certified Mail Return Receipt Card which is now marked as Defendant's Trial Exhibit 3 and placed the Schmidt Denial Notice into an envelope that was attached to the green Certified Mail Return Receipt Card.

13. Ms. Barbara Ann Hemby was employed by the DDD Company during November of 1986 as the assistant supervisor for the mail room used by the FAA. DDD Company was an independent contractor of the United States Department of [485] Transportation at that time and was authorized during November of 1986 to operate the mail room used by the Office of the Chief Counsel for the FAA located at 800 Independence Avenue, S.W., Washington, D.C., to collect mail from the FAA's outgoing mailbox located in the Office of the Chief Counsel and to deposit mail collected from the Office of the Chief Counsel into the United States Mail.

14. On November 20, 1986, Ms. Hemby recorded in a logbook maintained by her for that purpose that she had received from the FAA for mailing from her mail room the certified letter which was addressed to and received by Plaintiffs' counsel and which contained the notice of the final denial of the Plaintiff's claim.

15. The certified letter so addressed to Plaintiffs' counsel was collected by the United States Postal Service on November 20, 1986, and the notice of final denial of the Plaintiffs' claim was mailed by the FAA on that date to Plaintiffs' counsel who, as has heretofore been found, received the same on November 24, 1986.

16. The United States did not act or fail to act in any manner which misled the Plaintiffs or their counsel to reasonably believe that the denial notice was mailed after November 20, 1986, and

the Plaintiffs and Plaintiffs' counsel were not induced or tricked into allowing the filing deadline to pass.

[486]

17. The Plaintiffs failed to file their action, this action, within six months after the date of mailing by certified or registered mail of notice of final denial of their claim by the Federal Aviation Administration. The Plaintiffs' action was therefore not filed within the time required by law. The doctrine of equitable tolling does not apply in this case there being no grounds to apply it, and the Plaintiffs' action is dismissed and held for naught with the costs taxed to the Plaintiffs.

The Clerk is directed to enter judgment accordingly in favor of the Defendant and against the Plaintiffs dismissing their action.

Is there anything further to come before the Court in connection with this matter? Mr. Madigan?

MR. MADIGAN: No, Your Honor.

MR. LADD: No, Your Honor.

THE COURT: You are excused.

MR. LADD: Thank you, Your Honor.

4:53 p.m.

(COURT RECESSED)

Peggy Casper, C.S.R.
P.O. Box 1278
Omaha, Nebraska 68101-1278

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3002

Phyllis Schmidt; Earl Schmidt,
Appellants,

v.

United States of America,
Appellee.

Appeal from the United States District Court
for the District of Nebraska.

[UNPUBLISHED]

Submitted: May 10, 1993
Filed: June 3, 1993

Before BOWMAN, WOLLMAN, and MAGILL, Circuit Judges.

PER CURIAM.

Phyllis and Earl Schmidt appeal the dismissal of their Federal Tort Claims Act case. The District Court[1] based its judgment upon its finding, made after trial, that the Schmidts did not begin their action within six months after the date the Federal Aviation Administration mailed them, by certified mail, its final denial of their claim. Consequently, the court held that the Schmidts' action was not timely filed and is barred by the six-month limitation period in 28 U.S.C. § 2401(b). For reversal, the Schmidts attack the District Court's findings and one of its evidentiary rulings. They also argue that the court erred in

---

[1] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

declining to apply the principles of equitable estoppel or equitable tolling.[2]

Having carefully considered the briefs and arguments of the parties and the record in this case, we conclude that the judgment of the District Court is based on findings of fact that are not clearly erroneous, that no error of law appears, and that an opinion would have no precedential value. Accordingly, the judgment of the District Court is affirmed without opinion.[3] *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

[2] In addition, the Schmidts argue in their reply brief that the District Court erred in its method of calculating the six-month limitation period. This issue apparently was not raised in the District Court and thus is not properly before us. In any event, we conclude that the argument has no merit.

[3] In reaching our decision, we have not considered any of the exhibits referenced in plaintiffs' motion to exclude certain of defendant's exhibits. The motion is denied as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3002NEO

Phyllis Schmidt; Earl Schmidt,
Plaintiffs-Appellants,

vs.

United States of America,
Defendant-Appellee.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

July 19, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1328

Phyllis Schmidt and Earl Schmidt,
Appellants,

v.

United States of America,
Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Submitted: March 26, 1991
Filed: May 15, 1991

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and HUNTER,* District Judge.

HEANEY, Senior Circuit Judge.

On plaintiffs' petition for writ of certiorari, the United States Supreme Court vacated this panel's opinion in *Schmidt v. United States*, 901 F.2d 680 (8th Cir. 1990). The Supreme Court remanded this case for further consideration in light of *Irwin v. Department of Veterans Affairs*, 498 U.S. __, 112 L.Ed.2d 435 (1990). We now reverse the order of the district court dismissing the Schmidts' complaint for lack of subject matter jurisdiction and remand this case for trial on the merits of the Schmidts' Federal Tort Claims Act claim.

The facts and procedural history of this case are fully set forth in our prior opinion. The issue before the district court was

* The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, sitting by designation.

whether the Schmidts commenced their action within the statutory limitations period of the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 2401(b) (1988). The government raised this issue in a motion under Fed. R. Civ. P. 12(b)(1), challenging the district court's subject matter jurisdiction of the Schmidts' claim. The issue turned on the date of mailing by the Federal Aviation Administration (FAA) of notice to the Schmidts of the final denial of their administrative claim, an event which commenced the running of the FTCA's statute of limitations.

The district court found that neither the Schmidts nor the government could establish the date on which the denial notice was mailed. The court noted that compliance with the statute of limitations was a jurisdictional prerequisite, and that the Schmidts bore the burden of establishing jurisdictional facts once the government challenged the court's subject matter jurisdiction. Because the Schmidts failed to establish the date on which the denial notice was mailed, the district court dismissed their complaint. This court affirmed.

Following our decision affirming the district court, the Supreme Court decided *Irwin v. Department of Veterans Affairs*, 498 U.S. __, 112 L.Ed.2d 435 (1990). *Irwin* held that statutes of limitations in suits against the government are subject to equitable tolling. 112 L.Ed.2d at 444. Necessary to this expressed holding is an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government. If the statute of limitations were jurisdictional, the court would have no power to consider tolling it. Prior to *Irwin*, the circuits divided over the question whether statutes of limitations on suits against the government were absolute jurisdictional limits. *Compare, e.g., Powers v. United States*, 390 F.2d 602, 604 (9th Cir. 1968) *with Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982). The Supreme Court in *Irwin* stated that it "granted certiorari . . . to resolve the Circuit

conflict over whether late-filed claims are jurisdictionally barred." 112 L.Ed.2d at 441.

This court's holding in *Schmidt* was premised on the assumed jurisdictional nature of the FTCA's statute of limitations. 901 F.2d at 683. We held that the district court had properly required the Schmidts to establish subject matter jurisdiction, and that their failure to do so required a dismissal under Fed. R. Civ. P. 12(b)(1). *Id.*

The effect of *Irwin*'s implicit holding is to remove the burden of proving the date of mailing from the Schmidts. Because the FTCA's statute of limitations is not jurisdictional, failure to comply with it is merely an affirmative defense which the defendant has the burden of establishing. *See* Fed. R. Civ. P. 8(c). The district court found that neither the government nor the Schmidts had established the date of mailing of the denial notice. The government therefore would not have met its burden had the burden been placed on it in the district court. Had the district court considered the question on the government's motion for summary judgment rather than on a 12(b)(1) motion, the government would have had the burden on the statute of limitations defense, and the facts would have been viewed in the light most favorable to the Schmidts. The date of mailing of the FAA's administrative denial notice remains a disputed issue of material fact, making this case appropriate for trial. Under *Irwin*, the Schmidts' complaint was improperly dismissed.

Accordingly, we reverse the judgment of the district court dismissing the Schmidts' complaint for lack of subject matter jurisdiction and remand this case for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 19, 1991

Mr. John P. Madigan, Jr.
818 Olive Street
Suite 1050
St. Louis, MO 63101

Re: Phyllis Schmidt, et vir
v. United States
No. 90-459

Dear Mr. Madigan:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Irwin v. Veterans Administration, 489 U.S. _____ (1990).

Very truly yours,
/s/ William K. Suter
William K. Suter, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1328NE

Phyllis Schmidt, et al.,
Appellants,

v.

United States of America,
Appellee.

Order Denying Petition for Rehearing with
Suggestion for Rehearing En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION

(Filed: Dec. 29, 1988)

This matter is before the Court upon defendant's objections (Filing No. 22) to the magistrate's findings and recommendations (Filing No. 20). Pursuant to 28 U.S.C. § 636(b)(1)(B), this Court had conducted a *de novo* review of those portions of the findings and recommendations to which defendant has objected.

Plaintiffs have brought this action seeking the recovery of monetary damages under the Federal Tort Claims Act (Act) 28 U.S.C. §§ 1346(b) and 2671. Previously, plaintiffs had pursued an administrative claim with the Federal Aviation Administration (FAA). On November 24, 1986, plaintiffs' attorney received a letter notifying them that the administrative claim had been denied. On May 21, 1987, plaintiffs filed this action.

Defendant, United States, has filed a motion to dismiss and an amended motion to dismiss (Filing Nos. 5 and 10) claiming that plaintiffs have failed to timely file their complaint. The Court issued an order (Filing No. 11) stating that these motions would be treated as a motion for summary judgment so that the parties could submit evidence relevant to the motions. Subsequently, the Court issued a memorandum (Filing No. 27) stating that

although summary judgment has often been an effective way to deal with jurisdictional matters, it was not appropriate in this case. The Court further stated there in that it should be clearly understood that the burden is upon plaintiffs to show that they have complied with 28 U.S.C. § 2401(b), which would establish jurisdiction in this matter. What the Court has effectively done is allow the parties to submit evidence in order that the Court may make a proper determination as to whether it has jurisdiction in this matter. This is similar to the handling of a summary judgment motion pursuant to Fed. R. Civ. P. 56, and it is certainly proper and necessary in this case. *See Crawford v. United States,* 796 F.2d 924, 928 (7th Cir. 1986).

The central issue in this case is whether plaintiffs filed this lawsuit within six months of the mailing of the final denial of their administrative claim by the FAA. This time limitation must be complied with in order for the Court to have subject matter jurisdiction. 28 U.S.C. § 2401(b). The evidence which has been submitted indicates that the letter which was sent to plaintiffs, and which informed plaintiffs that their administrative claim had been denied, was dated November 19, 1986. However, it is not clear which date the letter was actually mailed. As a result, determining when the six-month period began to run is made difficult.

The FAA employed a private mail service, DDD Company, (DDD) to pick up its mail, sort it and deliver it to the post office. The log books of DDD indicate that the denial letter was picked up on November 20, 1986, and that it had a green receipt card attached. The receipt card indicated that the letter was to be sent by certified mail, as was required by 28 U.S.C. § 2401(b).[1]

[1] The Court hereby finds that said letter was sent by certified mail. There is no evidence which suggests otherwise. Plaintiffs claim that the FAA failed to comply with the statutory mailing requirements, specifically, 39 U.S.C. § 5012, is non-persuasive. In fact, it appears that plaintiffs, by referencing § 5012, are relying upon a portion of Title 39 which no longer exists. Title 39 was revised by Congress in 1970. *See* Postal Reorganization Act. Pub. L. 91-375, § 2, 84 Stat. 719 (1970).

Ultimately, on November 24, 1986, the receipt was signed by plaintiffs' attorney when the letter was delivered.

The letter could not be considered "mailed" until it had been properly addressed and deposited in a post office box or left at a United States Post Office. *Davis v. Pennsylvania Railroad,* 7 FRD 622, 623 (N.D. Ohio 1947). *See also Satterfield v. Celebrezze,* 244 F. Supp. 190 (W.D. S.C. 1965).[2] However, when the mailing of the letter actually occurred is not clear. The evidence indicated that it was either November 20, or November 21, depending upon when the mail was picked up from DDD by the post office. Plaintiffs assert that it is the responsibility of the defendant to know which date is correct, and that because defendant does not know, plaintiffs should not be penalized.

This assertion sidesteps the Court's earlier order. When a defendant challenges jurisdiction, the burden is upon the plaintiff of establishing the jurisdictional facts. *Western Nebraska Resources v. Wyoming Fuel Co.,* 641 F. Supp. (D. Neb. 1986). Plaintiffs have simply failed to establish these facts. Furthermore, the Court knows that the plaintiffs were in possession of the letter, therefore, they were clearly aware that the letter was dated November 19, 1986. In spite of this knowledge, plaintiffs chose to wait until May 21, 1987, to file this action.

Therefore, the Court finds that defendant's motion to dismiss (Filing Nos. 5 and 10) should be granted and this action dismissed. A separate order shall be entered this date in accordance with this memorandum opinion.

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[2] The Court hereby rejects the holding in *Texas Casualty Insurance Company v. McDonald,* 269 S.W.2d 456 (Tex. Civ. App. 1954), wherein it was held that a mailing occurs when a letter is placed in the custody of an officer of the company who was charged with the duty of forwarding the mail. This decision appears to set forth a minority position on an issue where there is admittedly little existing authority.

Dated this 29th day of December, 1988.

BY THE COURT:

/s/ WILLIAM G. CAMBRIDGE
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1328

Phyllis Schmidt and Earl Schmidt,
Appellants,

v.

United States of America,
Appellee.

Appeal From the United States District Court
for the District of Nebraska.

Submitted: February 14, 1990

Filed: April 25, 1990

Before BOWMAN, Circuit Judge; HEANEY, Senior Circuit Judge, and HUNTER,* District Judge.

HEANEY, Senior Circuit Judge.

Phyllis and Earl Schmidt appeal from the order of the district court dismissing their complaint under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982 (FTCA), for lack of subject matter jurisdiction. We affirm.

BACKGROUND

On December 20, 1983, air traffic controllers cleared an Ozark Airline plane to land in Sioux Falls, South Dakota. Phyllis Schmidt, a flight attendant on the plane, was injured when the plane struck a snow removal vehicle after landing on the runway.

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* The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, sitting by designation.

The Schmidts filed an administrative claim for damages with the Federal Aviation Administration (FAA) on November 1, 1985, alleging that the air traffic controllers were negligent in failing to instruct the driver of the snowblower to leave the runway before they cleared the plane to land there.

The FAA issued a final denial of the Schmidts' claim in a letter dated November 19, 1986. The Schmidts' attorney received the letter on November 24, 1986. The Schmidts filed their *FTCA complaint in the district court on May 21, 1987.*

The United States moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that because the FAA had mailed its final denial on November 20, 1986, the Schmidts failed to commence their action within six months of the mailing of the FAA's final denial as required by 28 U.S.C. § 2401(b).[1] Both parties filed written evidence on the jurisdictional question.

The Schmidts opposed the motion to dismiss by alleging that the denial letter was not mailed until November 12, [sic], 1986 and the six-month limitation period therefore did not expire until May 21, 1987. Neither the government nor the Schmidts could prove precisely when the denial letter was mailed, because the FAA gives its outgoing mail to a private mail contractor, DDD Co., from whom the United States Postal Service collects it. A DDD employee logs and assigns a number to any certified mail from the FAA in a logbook provided by the Postal Service, then places the mail in a tray for collection by the Postal Service. The

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[1] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1982).

Postal Service collects such mail twice daily, but provides no receipt for certified mail. Thus, although DDD has a record of receiving the Schmidts' denial letter from the FAA on November 20, 1986, no record shows that the Postal Service actually collected the letter that day.

Barbara Hemby, the DDD assistant supervisor who logged the Schmidts' denial letter on November 20, stated in an affidavit that the Postal Service should have picked up the letter in its second collection day, around 5:00 p.m., but noted that she left work at 4:00 p.m. Hemby stated that the Postal Service had never failed to make the 5:00 p.m. pickup.

Steve Croston, the Postal Service's supervisor of government mail for Washington, D.C., stated that if the postal employee responsible for making the 5:00 p.m. pickup from DDD had failed to do so, he would have filed an irregularity report explaining the reason for the failure. No such report was filed. Croston also stated that if a scheduled pickup is not made, postal employees can make arrangements to enter government buildings after hours to collect mail, and that no mail ready for collection would have been left uncollected overnight.

A.T. Wolder, Director of Marketing and Communications for the Postal Service in St. Louis stated that first-class mail sent from Washington, D.C. to St. Louis would arrive in three days. Consequently, the Schmidts' attorney would have received the denial letter on Monday, November 24 whether it was mailed on Thursday, November 20 or Friday, November 21.

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, but did not decide whether the denial letter was mailed on November 20 or November 21. The court concluded that the Schmidts bore the burden of establishing jurisdictional facts and that they had failed to do so. The court also noted that because the Schmidts knew the letter

was dated November 19, 1986, they should not have waited until May 21, 1987 to file their complaint.

DISCUSSION

On appeal, the Schmidts argue that the district court erred in dismissing their complaint because the date on which the denial letter was mailed constitutes a disputed issue of material fact. They also argue that the FAA failed to send the denial letter by certified or registered mail, as the statute requires, and that the denial letter therefore did not start the six-month limitation to run. Neither of those contentions has merit.

Institution of an action against the United States within the six-month limitations period is a jurisdictional requirement. *See* 28 U.S.C. § 2401(b); *Powers v. United States*, 390 F.2d 602, 604 (9th Cir. 1968). The district court correctly noted that the Schmidts bore the burden of establishing subject matter jurisdiction once the Government challenged it. *See Butts Feed Lots, Inc. v. United States*, 690 F.2d 669, 670 (8th Cir. 1982) (burden of establishing jurisdiction lies with plaintiff). The existence of subject matter jurisdiction is a question of law that the court of appeals reviews de novo. *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1032 (9th Cir. 1987); *Hilliard v. United States Postal Serv.*, 814 F.2d 325, 326 (6th Cir. 1987).

Our review of the evidence suggests that the Postal Service most likely did receive the denial letter on November 20, 1986, as the Government contends. In any case, the evidence fails to establish the Schmidts' contention that the denial letter was not mailed until November 21, 1990. Consequently, the Schmidts have failed to carry their burden of establishing the facts to support subject matter jurisdiction.

The Schmidts alternatively claim that because the FAA or its agent, DDD, failed to get a sender's receipt from the Postal Service, it did not comply with the statute's requirement that the

denial letter by sent by certified mail. The Schmidts support this argument with citations to several standard dictionaries defining "certified mail" as mail for which the sender gets a receipt. Postal regulations also define "certified mail service" as providing a receipt to the sender. 39 C.F.R. ch. III, pt. 3001, subpt. C., app. A, § 501 (1989). The regulations do not require, however, that the sender's receipt indicate the time of mailing. *See id.* The Postal Service will indicate the time of mailing on the sender's receipt only if the sender requests it. *Id.* § 5.021. For customers who send large quantities of certified mail, the Postal Service provides logbooks, such as that used by DDD, in which the sender indicates the number and date of each article sent by certified mail. In such a case, the pages of the book become the sender's receipts. *Domestic Mail Manual* § 912.4.45, at 486 (Dec. 20, 1987).[2] Consequently, DDD's certified mail procedure satisfied the statutory requirement of 28 U.S.C. § 2401(b) and commenced the running of the six-month limitation period. Because the Schmidts did not file their FTCA claim until May 21, 1987, the claim was untimely and the district court had no jurisdiction to hear it.

CONCLUSION

We affirm the order of the district court dismissing the Schmidts' FTCA complaint for lack of subject matter jurisdiction.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[2] The United States Postal Service has incorporated the *Domestic Mail Manual* by reference into its regulations. *See* 39 C.F.R. § 111.1 (1989).

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

Civil No. CV87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

MOTION TO DISMISS COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b), defendant United States moves to dismiss plaintiffs' complaints, and in support thereof states:

1. A tort claim against the United States shall be forever barred unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which is was presented. 28 U.S.C. § 2401(b).

2. Plaintiffs' claim was denied by letter mailed from the Federal Aviation Administration to plaintiffs' attorney (certified mail-return receipt requested) on November 19, 1986. A copy of that letter is attached.

3. Plaintiffs' complaint was not filed until May 21, 1987.

4. The Court lacks jurisdiction over this matter because plaintiffs failed to begin the action within six months after the date of mailing of the final denial by the agency, as required by 28 U.S.C. § 2401(b).

WHEREFORE, the United States of America prays that plaintiffs' complaint be dismissed at plaintiffs' costs.

Dated: July 20, 1987

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RONALD D. LAHNERS
United States Attorney

PAUL JOHNS
Assistant United States Attorney

/s/ James C. Wilson
JAMES C. WILSON
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

Civil No. CV87-0-347

PHYLLIS SCHMIDT and EARL SCHMIDT,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

AMENDMENT TO MOTION TO DISMISS COMPLAINT

Defendant United States amends its Motion to Dismiss Complaint filed in this case on July 22, 1987 as follows:

1. Further investigation has established that plaintiffs' claim was denied by letter mailed from the Federal Aviation Administration to plaintiffs' attorney (certified mail-return receipt requested) on November 20, 1986, rather than November 19, 1986.

2. Attached is a copy of a record maintained by a firm which handles mail for the Federal Aviation Administration. This document establishes that the letter was mailed on November 20, 1986. The relevant entry is marked in yellow.

3. Plaintiffs' complaint was not filed until May 21, 1987.

4. The Court lacks jurisdiction over this matter because plaintiffs failed to begin the action within six months after the date of mailing of the final denial by the agency, as required by 28 U.S.C. § 2401(b).

WHEREFORE, the United States of America prays as in its original Motion to Dismiss.

Dated: August 25, 1987

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RONALD D. LAHNERS
United States Attorney

PAUL JOHNS
Assistant United States Attorney

/s/ James C. Wilson
JAMES C. WILSON
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

Supreme Court, U.S.
FILED
DEC 16 1993
OFFICE OF THE CLERK

No. 93-590

In the Supreme Court of the United States

OCTOBER TERM, 1993

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Fed. R. Civ. P. 6(e) extends the statute of limitations for filing an FTCA action by three days.

2. Whether the procedures followed by the FAA in sending a letter denying petitioners' administrative claim constituted a certified mailing within the meaning of 28 U.S.C. 2401(b).

3. Whether equitable tolling excuses the late filing of a complaint where the complainants allege that their adversary dated a letter one day before mailing it.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-590

PHYLLIS SCHMIDT AND EARL SCHMIDT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A5-A6) is unpublished, but the decision is noted at 994 F.2d 843 (Table). The decision of the district court (Pet. App. A1-A4) is also unreported and was delivered orally.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1993. A petition for rehearing was denied on July 19, 1993. Pet. App. A7. The petition for a writ of certiorari was filed on October 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Phyllis Schmidt, a flight attendant, was injured in 1983 when the Ozark Airline plane on which she was flying struck a snow removal vehicle after landing in Sioux Falls, South Dakota. Mrs. Schmidt and her husband, petitioner Earl Schmidt, filed a claim for damages with the Federal Aviation Administration on November 1, 1985. In their claim, petitioners alleged that the air traffic controllers in Sioux Falls were negligent in failing to instruct the driver of the snow blower to leave the runway before granting the Ozark flight clearance to land. Pet. App. A17-A18.

The FAA denied petitioners' claim in a letter dated Wednesday, November 19, 1986. Petitioners' attorney signed the receipt for the letter five days later, on Monday, November 24. The letter notified petitioners that if they were dissatisfied with the FAA's determination, they could "initiate action in an appropriate United States District Court, * * * not later than six months after the date of mailing of this notification." Pet. App. A2. Petitioners filed their complaint in federal district court, alleging jurisdiction under the Federal Tort Claims Act, on Tuesday, May 21, 1987. Pet. App. A14, A18.

2. The government moved to dismiss petitioners' complaint for lack of subject matter jurisdiction, arguing that it was untimely filed under 28 U.S.C. 2401(b). Section 2401(b) provides that an action against the United States under the FTCA must be commenced "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." In their opposition to the government's

motion, petitioners argued that the letter from the FAA had been mailed to petitioners' attorney on Friday, November 21, 1986, and that the complaint had been timely filed exactly six months later. Pet. App. A18.

The government's motion to dismiss was referred to a magistrate. The magistrate recommended to the district court that the government's motion be denied since the date of mailing of the letter from the FAA was uncertain. The district court, however, upheld the government's objection to the magistrate's recommendation and granted the government's motion to dismiss for lack of subject matter jurisdiction. The district court found that the FAA employed a private mail service, DDD Company, to pick up its mail, sort it, and deliver it to the post office. Pet. App. A14. The court noted that the log books of DDD indicated that the denial letter had been picked up on November 20, 1986, and that it had a green receipt card attached. *Ibid.* The receipt indicated that the letter was to be sent by certified mail. *Ibid.* The district court held that, while the mailing date was not certain (*id.* at A15), the petitioners had the burden of "establishing the jurisdictional facts" and had failed to carry that burden. *Ibid.*

3. The court of appeals affirmed. Pet. App. A17-A21. Based on its review of the evidence presented in the hearing on the motion to dismiss, the court held that the Postal Service "most likely did receive the denial letter on November 20, 1986." *Id.* at A20. The court considered that petitioners "bore the burden of establishing subject matter jurisdiction once the Government challenged it" and concluded that "the evidence fails to establish [petitioners'] contention

that the denial letter was not mailed until November 21, 19[86]." *Ibid.*

The court of appeals also rejected petitioners' claim that, in not obtaining a dated receipt of mailing from the Postal Service, the FAA had failed to comply with the statutory requirement that denial letters be sent by certified mail. Pet. App. A20-A21.[1] The court explained that Postal Service regulations defining certified mail do not require a dated receipt of mailing and that customers sending large quantities of certified mail are allowed to use logbooks, in which they record the number and date of each mailing, as their receipts. *Id.* at A21; see United States Postal Service, Domestic Mail Manual § 912.45, at 486 (1987). Since DDD followed these procedures in mailing the letter denying petitioners' claim, the court held that the mailing was by certified mail and thus commenced the running of Section 2401(b)'s period of limitations. Pet. App. A21.

4. Following the court of appeals' decision, this Court decided *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), finding a statute of limitations in a suit against the government to be subject to equitable tolling. 498 U.S. at 95-96. On February 19, 1991, about two months after the *Irwin* decision, this Court granted a petition for certiorari filed by petitioners, vacated the court of appeals' judgment, and remanded this case "for further consideration in light of *Irwin*." Pet. App. A11.

On remand, the court of appeals held that a corollary to *Irwin*'s express holding allowing equitable

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[1] There has been no dispute that the FAA received a signed receipt reflecting petitioners' attorney's acceptance of the letter. Pet. App. A15.

tolling is the implied ruling that strict compliance with a statutory filing period is not a jurisdictional prerequisite to suit. Pet. App. A9. Since the court of appeals had premised its first decision on the assumed jurisdictional nature of the FTCA's statute of limitations, it remanded the case to the district court to determine when the denial letter had been mailed. *Id.* at A10. The court of appeals explained that because of this Court's *Irwin* holding, the district court should consider failure to comply with the FTCA statutory time limit as an affirmative defense which the government had the burden of establishing. *Ibid.*

5. The district court heard evidence concerning the mailing of the denial letter and determined that the government had met its burden of proof. The court held that the certified letter sent by the FAA to petitioners' counsel had been "collected by the United States Postal Service on November 20, 1986" and had been mailed on that day. Pet. App. A3. Since petitioners filed their action on May 21, 1987 (Pet. 4; Pet. App. A13), one day more than six months later, and since there were no grounds for equitably tolling the six-month time limit on filing an FTCA action, the district court again dismissed the petitioners' action. In an unpublished per curiam order, the court of appeals affirmed, holding that the findings of fact were not clearly erroneous and that there was no error of law. Pet. App. A6.

ARGUMENT

1. Petitioners contend that, even if the denial letter was mailed to their counsel on November 20, 1986, their filing of an action one day after six months had expired, on May 21, 1987, was within the six-month limitations period set by the FTCA in 28 U.S.C.

2401(b). Pet. 12-21. The issue of the proper method of calculating the six-month limitations period was never presented to the district court, and the court of appeals held that the issue was consequently not before it. Pet. App. A6 n.2. This Court ordinarily does not consider issues not properly raised below. *Helvering* v. *Wood*, 309 U.S. 344, 349 (1940). Even if the issue were properly raised at this time, however, it does not warrant a grant of certiorari.

Petitioners' argument that the six-month statutory period did not expire on May 20, 1987, is based in part on their view that Fed. R. Civ. P. 6(e) applies to the time limits set by 28 U.S.C. 2401(b). Pet. 16-18. If this were so, three days would be added to the prescribed period and their complaint would have been timely filed. While petitioners suggest that some differences have arisen among the federal courts concerning the methods by which statutory time periods should be computed (Pet. 13-14), they cite no conflict among the courts of appeals on the issue of whether Rule 6(e) is applicable to the time period set by 28 U.S.C. 2401(b) or, indeed, to any statute of limitations. Only one case has squarely addressed that question and has found Rule 6(e) inapplicable. *Carr* v. *Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975).[2] In the absence of any conflict on this question, further review is not warranted.

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[2] While petitioners cite cases holding that Rule 6(a) may be applied to federal statutes of limitations (Pet. 20), these cases do not conflict with *Carr* because the language and purpose of Rules 6(a) and 6(e) differ substantially. The reason for not using Rule 6(e) in making Section 2401(b) calculations is based on the purpose of Rule 6(e) and the wording of Section 2401(b). The Fifth Circuit in *Carr* correctly noted that while the prescribed period of limitations under Section 2401(b) begins

2. Petitioners also suggest that the letter denying their administrative claim was not sent by "certified mail" within the meaning of 28 U.S.C. 2401(b), since the FAA did not obtain an individual receipt of mailing showing the date that the letter was received by the Postal Service. Pet. 21-27. As petitioners note, the United States Postal Service Regulations define certified mail as "a service that provides a mailing receipt to the sender and a record of delivery at the office of address." 39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.010. The procedures used by the FAA in sending its denial letter to petitioners complied with those standards. The agency attached a "green Certified Mail Return Receipt Card" that "indicated that the letter was to be sent by certified mail" and which was later "signed by [petitioners'] attorney when the letter was delivered." Pet. App. A3, A14-A15. That receipt provided "a record of delivery at the office of address." See 39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.010. As the court of appeals noted in its first decision (Pet. App. A21), an individual receipt of mailing is not required for certified mail. When three or more letters are mailed at one time, the Domestic Mail Manual allows senders to use a "mailing book" furnished by the Post Office

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with the "date of *mailing*," Rule 6(e) applies only when the prescribed period begins with the "*service* of a notice or other paper." 522 F.2d at 1357 (emphases added). As the court in *Carr* explained, the purpose of Rule 6(e) is "to equalize the time for action available to parties served by mail with that afforded those served in person." *Ibid.* That concern is irrelevant in Section 2401(b) calculations "where the period during which notice must be provided commences in the same way for all claimants." *Ibid.*

(Postal Service Form 3877) to create the requisite receipt of mailing. See United States Postal Service, Domestic Mail Manual § 912.45, at 486 (1987).[3] DDD followed this procedure, and the entry in DDD's logbook for the denial letter constituted a mailing receipt for purposes of the Postal Service's definition of certified mail. The procedures used to send the FAA's denial letter accordingly satisfied the Postal Service's definition of "certified mail."

Petitioners provide no support for their contention (Pet. 24) that Section 2401(b) should be construed to require a mailing receipt showing the date that an article was received by the Postal Service. Nothing in the Postal Service's definition of "certified mail" supports such a requirement. To the contrary, postal regulations regarding certified mail provide that a receipt showing the date of mailing is optional:

> *If requested by the mailer*, the time of acceptance by the Postal Service will be indicated on the receipt.

39 C.F.R. Pt. 3001, Subpt. C, App. A, Classification Sched. SS-5, § 5.021 (emphasis added).[4]

As petitioners concede, their contention raises an issue "of first impression" on which there is no conflict among the courts of appeals. Pet. 21. Moreover, the decisions on which petitioners rely are inapposite. In *Lindemood* v. *Commissioner of Internal Rev-*

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[3] The Postal Service has incorporated the Domestic Mail Manual by reference in its regulations. See 39 C.F.R. 111.1.

[4] See also United States Postal Service, Domestic Mail Manual § 912.44*d*, at 486 (procedures to be followed if the sender desires a postmarked mailing receipt); *id.* § 912.44*e*, at 486 (procedures to be followed if a postmarked receipt is not desired).

enue, 566 F.2d 646 (1977), the Ninth Circuit had no occasion to address the definition of certified mail. Rather, the court applied a statute, 26 U.S.C. 7502, and detailed Treasury Department regulations regarding proof of the date of filing of petitions for redeterminations of tax deficiencies with the Tax Court. 566 F.2d at 647-649. Those regulations and that statute have no bearing on this case. In *Johnson* v. *United States*, 652 F. Supp. 407 (E.D. Va. 1987), the government sent a denial letter by first-class mail without attempting to use registered or certified mail and thus clearly failed to meet the requirements of 28 U.S.C. 2401(b). Lastly, in *Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984), the court concluded that the letter sent by the agency was not a final denial of the plaintiff's claim.

3. Finally, petitioners argue that their failure to file a timely action should be excused under equitable tolling principles. Petitioners argue that "the FAA induced and tricked [petitioners] into believing that the Statute of Limitations had run on May 19, 1987." Pet. 27. Petitioners apparently rely on this Court's statement in *Irwin* that equitable tolling is appropriate "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96. But even if the FAA had deliberately dated its letter one day before the letter was mailed, that would, at worst, have induced petitioners to file *before*, not after, the filing deadline, and thus would not have led to petitioners' allowing the filing deadline to pass.

Petitioners allege that they examined the FAA letter exactly six months after it was mailed, on May 20, 1987. Pet. 29. Seeing the November 19, 1986, date, they assumed that they were already untimely,

"[g]iven the Eighth Circuit's interpretation of 2401(b) at that time." *Ibid.* As a result, they suggest that they made no effort to rush the obviously untimely complaint to the district court, when they might otherwise have "faxed the complaint to Omaha" or "flown it themselves to Omaha." *Ibid.* Even assuming the truth of these facts, petitioners have produced no evidence that the FAA's dating of the letter was "misconduct," that petitioners were "tricked" within the meaning of *Irwin*, or that the FAA should be deemed responsible for their failure to file their complaint as soon as possible after discovering that it was apparently untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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